In the Supreme Court

OF THE

United States

Supreme Court, U.
FILED
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CLERK

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

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In the Supreme Court
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October Term, 1944

No. 155

Ernest H. Denicke and Mary E. Doble,
Petitioners,

vs.

The Anglo California National Bank of San Francisco (a national banking association), Mortimer Fleishhacker, Herbert Fleishhacker, Mortimer Fleishhacker, Jr., George I. Cochran, Philip S. Baker, R. D. Brigham, Walter E. Buck, Walter A. Haas, Paul E. Hoover, William F. Humphrey, Samuel Kahn, Victor Klinker, William B. Reis, Paul Shoup, Leon Sloss, Jr., Louis Sutter, Alfred B. Swinerton, T. C. Tilden, Joseph O. Tobin, Willard O. Wayman, Irene L. Berg, Executrix of the will of William H. Berg, Deceased, R. Stanley Dollar and Frank Moss,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named, hereby apply to this Court for a rehearing and reconsideration of the order entered October 9, 1944 denying petition for writ of certiorari.

First ground—Application for summary orders to vacate void entries in Circuit Court.

Petitioners apply for summary relief available by memorandum opinion, order or summary process of this Court under Rule 38 and under Section 240 of the Judicial Code, to compel the Circuit Court of Appeals for the Ninth Circuit to vacate the following proceedings of record in said Court in case No. 10,329, viz.:

1. Typewritten opinion bearing sole signature of Circuit Judge, William Healy, filed March 1, 1944 during adjournment of Court.

2. Minute entry of Clerk made on March 1, 1944 and entitled "Order Directing Filing of Opinion and Filing and Recording of Decree." (R. 1995.)

3. Unsigned printed form of "Decree" filed by Clerk on March 1, 1944 during adjournment.

4. Minute entry containing copy of such "Decree". (R. 2004.)

Reason: These entries are void for violation of CCA Rule 3.

Second ground—Application for summary orders to compel Circuit Court to pronounce judgment and render opinion on questions submitted in support of appeal.

Petitioners also apply for a summary order of this Court requiring said Circuit Court to perform the following duties required to effect an adequate appellate review of this cause in pursuance of Section 128 of the Judicial Code, viz.:

(a) To grant a hearing of said cause in bank.

(b) To render a decision according to law determining the following question affecting the validity of the judgment under review in said proceeding:

1. Whether the District Court granted petitioners a Constitutional trial on their objections (R. 333, 340, and 403) under the terms of the minute entries made by said Court which appear at R. 392, 398-399, 399, 402, 429 and 438).
2. Whether petitioners were entitled to set aside the judgment of District Court on the ground of mistake, because of reliance upon the terms of said minute entries.
3. Whether the District Court acted arbitrarily, or in excess of its discretion, or failed to exercise any discretion in denying the motion to vacate and other applications for relief described in the order at R. 737-739 made by said Court on August 17, 1942.

(c) To evidence such decision by an opinion in writing bearing signatures of a majority of the judges acting and filed in compliance with Rule III of said Circuit Court, such opinion to indicate the action taken by such Court

on each question affecting the validity of the judgment under attack.

(d) To enter a lawful judgment in accordance with an opinion so prepared and filed.

Reason: There has been a total failure to discharge that responsibility.

Third ground—Summary action under Rule 38, Sub. 5(b) and Judicial Code, Sec. 240—mandate for reversal with further proceedings in accordance with precedent.

The judgment is void on its face. This Court can recognize that error and direct remand for further proceedings.

A summary order should issue, after notice, to compel the following action in accordance with law:

1. Reversal of judgment entered by District Court. (R. 458.)
2. Instructions to vacate the minute order entered August 17, 1942. (R. 737.)
3. Granting of full hearing under objections now on file. (R. 333, 340, 403.)
4. Conduct of such hearing in accordance with principles expressed in *Cohen v. Young,* 127 Fed. 2d 721.
5. Application of standards expressed in *Case v. Los Angeles Lumber Products Co.,* 308 US 106, and in *Consolidated Rock Products Co. v. DuBois,* 312 US 510, to such hearing.
6. Making of special findings under Rule 52 FRCP after conclusion of such hearing—same to conform

to principles expressed in *Interstate Circuit Inc. v. United States,* 304 US 55; *Mayo v. Canning Co.,* 309 US 310; and *Public Service Comm. v. Wisconsin Telephone Co.,* 289 US 67.

7. Entry of a judgment in accordance with law based upon findings so prepared and filed.

Under Section 240 of the Judicial Code, we apply for summary relief, and for issuance of a mandate to that effect.

The Circuit Court is involved in irregularity and misconduct of such character as to render futile, a remand or further proceedings in that Court. A statement of that misconduct is attached hereto as Exhibit "A". We apply for a mandate running directly to the District Court, on the ground that such action is necessary to guarantee due process of law.

Fourth ground—Application for reconsideration and for order granting a writ and providing for argument and decision in this Court.

Under the preceding headings, petitioners have applied for every form of relief available to them by way of summary action to compel performance of the duties imposed by law upon the Circuit Court of Appeals for the Ninth Circuit. In the alternative, they have sought a mandate running directly to the District Court.

We present herewith, a petition for writ of mandamus, with motion for leave to file. That application is intended to cover any form of summary relief which this Court may deem beyond its power on issuance of a writ of certiorari.

If this Court shall determine not to grant a summary writ or allow application for writ of mandamus, it will then become necessary to provide for a review and decision in this Court. That relief would lie as a matter of right:

1. The Judiciary Act of February 13, 1925 (Chapt. 229, 43 Stat. 936) guarantees an absolute right of appellate review to every litigant who may file an action in a District Court of the United States.

2. There has been an unconstitutional denial of that right by the Circuit Court of Appeals for the Ninth Circuit. That denial amounts to a violation of the Fifth Amendment.

3. Our appeal is still tied up in a hopeless mass of irregularities committed by that Court. There is a deadlock. It cannot be broken without issuance of process by this Court.

4. A failure to break up that condition will leave petitioners without the benefit of an appeal guaranteed to them by Section 128 of the Judicial Code.

5. Under those conditions, this Court must treat the case as creating an absolute right to review and decision on certiorari. A writ for that purpose must issue, as of right, under Section 240 of the Judicial Code.

Fifth ground—Arbitrary denial of writ.

This Court has misinterpreted the Judiciary Act of 1925. It has assumed the existence of a power of arbitrary selection. It has applied that concept of the law in denying a writ. This conclusion is wholly at variance with that

statute. It cannot be reconciled with the testimony in committee nor with the Congressional debates. These proceedings explain the purpose of certiorari jurisdiction. They define the nature and extent of the power conferred on this Court by the Act of February 13, 1925. We present herewith a consolidated brief which includes analysis of that problem.

It is plain that this Court has not exercised a "sound judicial discretion", or in fact *any discretion* in denying a writ. In seeking relief under Section 240 of the Judicial Code, the following grounds were specified:

1. Gross irregularities in the Circuit Court—relief therefrom being a matter of right.

2. Denial of procedural due process in the District Court, and a sanctioning of that denial by the Circuit Court. This denial of fundamental right was shown by a judgment entered without trial at a time when minute orders of the District Court had continued the matter for a further hearing. Relief from that situation was a matter of right.

3. Jurisdiction invoked to enforce federal law. We demanded adequate findings under Rule 52 FRCP. That rule was adopted under 28 USCA 723(b)—a federal law. By decisions of this Court, compliance with that rule is mandatory. Violation thereof requires a reversal. These decisions are recognized as precedents. The jurisdiction of this Court was invoked to enforce compliance. Relief from that situation was a matter of right.

4. Conflict with Sixth Circuit. We show irreconcilable conflict between the result of this case and the decision in Cohen v. Young, 127 Fed. 2d 721, rendered in the Sixth Circuit. The existence of that conflict was fraudulently concealed by an opinion which carefully omits citation or discussion of that ruling. We have shown that this conflict was real and substantial—that it involved a question of federal law. Relief in such a case is a matter of right.

5. Breakdown in Circuit Court. We show that such Court refused to decide the questions submitted in support of our appeal. Relief from that condition is a matter of right.

In addition, our case involves questions whose importance cannot be doubted. If the Circuit Court had decided them, their importance would still require a writ. This Court could not exercise a sound judicial discretion and fail to recognize the great public importance of the following questions which are propounded:

(a) Standards required of a District Court in approving settlement of a shareholder's action under Rule 23(c) FRCP.

(b) Application of the rules of "fair and equitable conduct" announced by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 US 106; *Consolidated Rock Products Co. v. DuBois*, 213 US 510, and other Chandler Act cases, to that situation.

(c) Derivative status. Nature and extent of the right of petitioners to manage and control the litigation,

in a corporation where the majority stock is held by the Reconstruction Finance Corporation.

(d) Right to litigate the conduct of a management appointed by that Agency, where such conduct is put in issue by pleadings duly filed.

(e) Right to carry on derivative status as against such a management and to apply to that problem the principles announced by this Court in *Delaware & Hudson Co. v. Albany & Susquehanna RR Co.*, 213 US 435, and in *Doctor v. Harrington*, 196 US 579.

(f) Right to litigate the good faith of such management under the rule announced by this Court in *Pepper v. Litton*, 308 US 295.

(g) Right to maintain cross-examination and discovery against officers and directors of the Reconstruction Finance Corporation concerning matters which are the subject of suit.

(h) Nature and extent of any privilege which could be claimed by such witnesses to justify refusal to give testimony or exhibit material documents.

(i) Nature and extent of the power conferred by Congress upon the Reconstruction Finance Corporation under 15 USCA 604.

(j) Further definition of the legal status and responsibility of the officers and directors of RFC, in view of the following decisions of this Court:

RFC v. Menihan Corp., 312 US 81;

Keifer & Keifer v. RFC, 306 US 381;

Federal Housing Adm. v. Burr, 309 US 242;
Federal Land Bank v. Priddy, 295 US 229.

(k) Right to maintain discovery against officers of Federal Reserve and Federal Deposit Insurance Corporation concerning matters within scope of the litigation.

(l) Right to conduct such examination against the Chief National Bank Examiner and to ascertain from him the nature and description of documents which might be within the scope of a *subpoena duces tecum.*

(m) Right to issuance of such a subpoena in view of the principles announced by Chief Justice Marshall in *United States v. Burr.*

There is a further question which transcends all others in importance. This calls for analysis of the Judicial Process. We come here with a case which the Circuit Court has refused to decide. We have sought a writ and a decision in this Court under Section 240 of the Judicial Code. That application has been denied.

There are two federal courts, each with power to act. Both have refused. Between the rulings of these courts, we find a no-man's land into which petitioners have been cast under circumstances amounting to a miscarriage of justice.

The judicial power has been treated as a *discretion.* Under the Constitution, its exercise is a *matter of right.* Any citizen may invoke that power:

> "*The Judicial Power* of the United States *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.)

There has been a violation of the *rule* announced by Chief Justice Marshall in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403:

> "The judiciary cannot, as the legislature may, avoid a measure. . . . We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*"

Petitioners are citizens of the United States. They have exercised their right to invoke the jurisdiction of this Court. They resubmit the questions disclosed by the record and apply for relief upon each ground set forth herein.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing and for Relief under Judicial Code, Section 240, is well founded; and that the same is presented in good faith and not for purposes of delay.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

EXHIBIT "A"

MISCONDUCT.

Gross Irregularities in the Circuit Court.

Rule of Court.

". . . Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.

Dated: Nov. 30, 1936

(Signed) Curtis D. Wilbur
Francis A. Garrecht
William Denman
Clifton Mathews
Bert Emory Haney."

(Endorsed)
Filed Nov. 30, 1936
Paul P. O'Brien, Clerk

Flagrant Violation of That Rule.

"OPINION.

"Before: **Mathews, Stephens,** and **Healy,** Circuit Judges.

"**Healy, C. J.**

"This appeal is from a judgment in a derivative suit. . . .

"**We** need not stop to inquire . . . the opinion already sufficiently indicates **our view.** . . . **We** find no merit in other points argued.

Affirmed.

William Healy,
United States Circuit **Judges.**"

False Entries During Adjournment.

The Clerk made an entry, by which he "authorized himself" to file that opinion:

> "ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDNG OF DECREE.
>
> "By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause *be forthwith filed by the clerk,* and that a decree be filed and recorded . . . in accordance with the opinion rendered." (R 1996.)

A fictitious "decree" was then *filed* and *recorded.* (R 2004.)

An unsigned printed form was *filed.*

This form was then *recorded* by recopying in the minute book.

Motion to Vacate.

Those entries were challenged for violation of Court Rules. (R 2005-2014.)

Denial by Judges Involved in Violation.

> *Judge Mathews:* "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. *It isn't any of your business whether that is complied with, or not.*" (R 2058.)

Motion was denied by Judges *Mathews* and *Healy.* (R 2060.)

Application for Reassignment.

"Appellants . . . hereby apply for an order . . . pursuant to CCA Rule 4, sub. 2, directing that this cause be immediately reassigned for consideration by the entire court in bank; *that the petition for rehearing filed herewith be considered by the court in bank. . . .*" (R 2015.)

Instruction to Clerk.

"To Paul P. O'Brien, Clerk. . . .

". . . you are requested to present the attached Application for Reassignment to the Senior Circuit Judge for action on his part in accordance with CCA Rule 4, subs 1 and 2.

"*Appellants desire to make immediate application for such reassignment in order that the within Petition for Rehearing may receive consideration by the entire court in bank.*" (R 2014.)

Duty to Act.

That Application was in due form. The Clerk was the proper party to receive it. By law, and by Rule, the Court was bound to pass upon it. CCA Rule 4 provides:

"The calendars of the court shall be made up by the clerk *under the direction of the senior circuit judge subject to the approval of the majority of the judges.*

"The senior circuit judge *after conference* with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; *such designation or assignment may be modified or set aside by a majority of the judges.*"

Refusal to Act.

This Application was ignored.

There is no entry—no clue of any kind.

Not a fragment of evidence in the record to show what happened to it!

Petition for Rehearing in Bank.

This document is addressed:

"To the Honorable Curtis D. Wilbur, Senior Circuit Judge. . . .

"And to the Honorable Francis A. Garrecht, William Denman, Clifton Mathews, Albert Lee Stephens and William Healy, Circuit Judges. . . ." (R 2017.)

Refusal to Consider Petition in Bank.

Joint action could not be obtained. *Judges Mathews, Stephens and Healy sat alone to deny the petition.* (R 2061.)

Arbitrary Refusal to Grant Rehearing.

Glaring errors were specified:

1. Misconduct of Circuit Judge Healy resulting in false and void entries in violation of CCA Rule 3. (R 2061.)
2. Deliberately false statements of fact contained in the "Healy Opinion." (R 2019-2026; 2027-2030.)
3. Refusal to pronounce judgment upon the case as disclosed by the record. (R 2026.)
4. Refusal to order reversal because of judgment entered without trial. (R 2027.)

5. Violation of precedent, viz.: refusal to follow decisions of this Court, under which reversal was mandatory for lack of findings. (R 2030-2032.)

6. Refusal to cite, discuss, follow, or distinguish decision of Circuit Court of Appeals for the Sixth Circuit in *Cohen v. Young,* 127 Fed. 2d 721, or reconcile conflict between that case, and result of the decision in the case at bar. (R 2032-2033.)

7. Refusal to cite or follow decisions of California Supreme Court bearing on derivative right of appellants. (R 2033-2035.)

8. Further violation of precedent, viz.: refusal to cite, discuss, follow, or distinguish decision of this Court in *Delaware & Hudson Co. v. Albany & Susquehanna RR Co.,* 213 US 435, under which nonsuit of petition should have been granted. (R 2035-2039.)

9. Abuse of jurisdiction. Determination of alleged good faith of bank management—in advance of a trial of that issue. (R 2040.)

10. Refusal to determine the standards required for approval of a settlement under Rule 23c FRCP. (R 2041.)

11. Refusal to cite, discuss, follow or distinguish the principles announced by this Court in Chandler Act cases. (R 2043.)

12. Refusal to determine appellants' right to maintain discovery against persons involved in settlement negotiations. (R 2044.)

13. Refusal to determine appellants' right to examine into conduct of RFC, and officers thereof, in view of its status as majority shareholder. (R 2046.)

14. Abdication of duty in refusing to pronounce judgment on errors assigned in support of appeal. (R 2048.)

15. Refusal to follow precedent established by this Court in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403, under which the exercise of appellate jurisdiction is mandatory. (R 2051.)

That petition—specifying such irregularities—was passed on by the authors of the misconduct. *Circuit Judges Healy and Mathews sat to review their action in our case!*

A Breakdown in the Circuit Court.

There is no opinion—no judgment of the Circuit Court. A deadlock in that Court. A breakdown. *A deliberate and persistent refusal to act.*

MISCONDUCT.

Deliberate Violation of Duty.

The Circuit Court had the benefit of procedure which could have been employed to obtain the opinion of this Court upon any doubtful or important questions of law. We cite Judicial Code Sec. 239 (28 USCA 346):

> "*Certificates of questions by Circuit Courts of Appeals and Court of Appeals of District of Columbia.*
>
> "*In any case,* civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, the Court *at any time* may certify to the Supreme Court of the United States *any questions or propositions of law concerning which instructions are desired for the proper decision of the cause;* and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

We requested that Court to decide the precise questions which are now the subject of a Petition for Writ of Certiorari. *It refused to decide—and it refused to certify.*

This duty could have been performed "at any time". The Court had power to certify questions *before judgment.* It had power to take this step *after judgment*—before passing on the Petition for Rehearing.

There has been a studied effort to avoid the exercise of jurisdiction. Circuit Judges Healy and Mathews took every step necessary to make their action void under the rule announced by the California Supreme Court in *People v. Ruef,* 14 Cal. App. 576, 620-632. We quote from that opinion:

> ". . . the joint action or concurrence of four justices is the thing required to constitute the action of the court, and . . . in contemplation of law, this joint action is taken when four justices have in writing declared their concurrence in a particular order or judgment with intent to make it an order or judgment." (14 Cal. App. p. 624.)
>
> ". . . it is clear that the concurrence of a justice in an order granting an application for a hearing in this court after decision and judgment by a district court of appeal, cannot lawfully be given while such justice is not within the state, and, as we understand the argument of learned counsel for defendant, it is not claimed that Justice Henshaw could have assisted or participated in any way in making the order effectual as an order of this court while he was absent from the state, had he not indicated his assent before leaving the state by subscribing his name thereto." (14 Cal. App. 628.)
>
> "We have seen that the concurrence of four justices is essential to the validity of an order of the character here under consideration. This necessarily implies a concurrence of four justices, qualified and with power to act at the very moment of action as a court. . . ." (14 Cal. App. 628-629.)

"The word 'concurrence', as used in this connection, means agreement or union in action and design. There must be such agreement or union on the part of at least four justices qualified to act to make such an order effectual as an order of this court, and the uniting therein on the part of each justice is an exercise by him of a judicial function." (14 Cal. App. 629.)

"When Justice Henshaw left the state, no other justice had joined with him in assenting to such order, and the assent theretofore given by him amounted to nothing more than an indication by him to his associates of his then willingness to concur with three or more of them in such proposed order. . . . It is undoubtedly true, and is the settled practice of this court, that any justice may withdraw his previously indicated assent to either decision or order at any time before the decision or order is actually made. It is likewise true that such previously indicated assent on the part of any justice to either decision or order is ineffectual for any purpose, if, pending the actual making of the decision or order, such justice dies, or, for any reason, ceases to be a member of this court." (14 Cal. App. 629-630.)

"It therefore follows that the purported order must be held to be void for want of concurrence therein of the necessary number of justices. Without such concurrence there could be no valid order, and it becomes the duty of the court to strike the void order from its records." (14 Cal. App. 631.)

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CONSOLIDATED BRIEF IN SUPPORT OF PETITIONS FOR REHEARING, AND FOR SUMMARY RELIEF UNDER JUDICIAL CODE SECTION 240.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

ERNEST H. DENICKE and MARY E. DOBLE, *Petitioners,* vs. THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, et al., *Respondents.*	No. 155
ERNEST H. DENICKE, *Petitioner,* vs. R. D. BRIGHAM, et al., *Respondents.*	No. 196
MARY E. DOBLE, *Petitioner,* vs. WALTER E. BUCK, et al., *Respondents.*	No. 197

CONSOLIDATED BRIEF IN SUPPORT OF PETITIONS FOR REHEARING, AND FOR SUMMARY RELIEF UNDER JUDICIAL CODE SECTION 240.

We address ourselves to the following questions:

1. *Judicial Power.* The nature and extent of the power conferred on this Court by the Constitution of the United States.

2. *Rights on Certiorari.* The right of a litigant to invoke that jurisdiction under Section 240 of the Judicial Code.

3. *Duty on Certiorari.* Nature of the duty imposed on this Court on the filing of such an application—principles governing its exercise.

4. *Mandatory Review.* Determination of those cases wherein review lies as a matter of right.

5. *"Discretionary Review".* Cases where this Court has a "discretionary power" to grant "further review", *after review and decision in a Circuit Court of Appeals.*

Judicial Power.

This Court is a Constitutional Court. Its power is derived from Article III Section 1 of the Federal Constitution:

> "The judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The framers of our Constitution defined that "judicial power". They did not limit its exercise. It was not made the subject of a "discretion". It was absolute in form. It was conferred with intent that it be employed in every case.

"The judicial Power *shall extend to all Cases,* in Law and Equity, *arising under this Constitution, the Laws* of the United States, and Treaties made. . . ." (Article III Sec. 1.)

This Court was given original jurisdiction,

"In all Cases affecting Ambassadors, other public Ministers and Consuls. . . ." (Art. III Sec. 2.)

It was given appellate jurisdiction "in all other cases". (Article III Sec. 2.)

These clauses in our charter were expounded by Chief Justice Marshall in February Term 1821:

"It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. . . . *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* . . . We find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (*Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403.)

There is no difference, in principle, between the exercise of that power on certiorari—and the action of this Court on appeal. The distinction, if there be one, is limited to the rules governing its exercise.

Power to Invoke.

The processes of this Court are invoked by the filing of a petition for certiorari. When such application is made, a litigant becomes entitled to the exercise of a "sound judicial discretion", in relation to any matters which Congress has confided to the "discretion" of this Court.

He becomes entitled, as of right, to a writ in those cases where Congress has not made relief subject to any discretionary power.

> "While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the Court is authorized merely to exercise a will in the matter, but rather that the petition is to be granted or denied according to a sound judicial discretion."[1]

This rule is impartially applied:

> "Under the Jurisdictional Act of 1925 there are only a limited number of cases in which the right of appeal to the Supreme Court is allowed, and the Court determines on application for certiorari what cases should be brought before the court. That is a very important exercise of authority, and there is nothing that we do to which we give greater attention
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> . . .
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> "The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, or *because of the character or prominence of the parties, or because of the counsel.* The question before the Supreme Court is, manifestly, the importance of the

[1]Testimony of Justice Van Devanter before House Judiciary Committee on HR 8206—68 Congress Second Session—Report No. 1075, pp. 2-3.

question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, *not as to the parties*, not as to the amount of money involved, *not as to counsel, but as to the law.*"[2]

Scope of Jurisdiction.

Congress did not intend this Court to become a court for the trial of government litigation. The jurisdiction was not limited to cases where the federal government, or an agency thereof sought to invoke the jurisdiction:

> "*In any case,* civil or criminal, in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court of the United States, *upon the petition of any party thereto, whether Government or other litigant,* to require . . . . that the cause be certified. . . ." (Judicial Code Sec. 240.)[3]

Duty on Certiorari.

There is no arbitrary power of selection:

> "While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the Court is authorized merely to exercise a will in the

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[2]Testimony of Chief Justice Hughes on Mar. 25, 1935, before Senate Judiciary Committee of 74th Congress First Session, on Senate Bill 2176, pp. 6-7.

[3]See page 11 of Report of Supreme Court Committee on Judiciary Amendments which contains the following comment:

> "The words 'whether government or other litigant', were inserted to lay at rest a doubt which appears to prevail in some quarters as to the right, under the existing law, to issue a certiorari upon petition of the government in a criminal case."

matter but rather that the petition is to be granted or denied according to a sound judicial discretion".[4]

Mandatory Review.

1. Denial of procedural due process.

No federal court has the power or constitutional right to enter a judgment without trial. No court created under our federal Constitution has the right to sanction a decree entered in that manner. Where that principle is violated, relief on certiorari is a matter of right.

2. Enforcement of Federal Law.

That responsibility is imposed by the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the *supreme Law of the Land. . . .*" (Article VI.)

We have ten Circuit Courts of Appeals—more than forty-eight District Courts. Unless there is one law,—and a uniform enforcement of that law,—we have a condition that will approach judicial anarchy.

These Courts are bound to enforce the federal law on application of any party.

There are ten circuits. The Court established in each circuit is bound by that responsibility.

This Court is bound by the Constitution of the United States.

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

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[4]Testimony of Justice Van Devanter before House Judiciary Committee—Report No. 1075 on HR 8206—68th Congress 2d Session at page 3.

Courts as the Congress may from time to time ordain and establish." (Article III Sec. 1.)

". . . all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution." (Article VI.)

3. Conflicts between Circuits.

Where ten circuits and forty-eight or more federal districts persist in declaring or enforcing diametrically opposite interpretations of federal law—that law ceases to be the "supreme law of the land". In cases presenting a conflict, issuance of a writ becomes a matter of Constitutional right.

". . . it is the invariable practice of the Supreme Court, in cases which have been differently decided by Circuit Courts of Appeals to allow a writ of certiorari. The effort is to bring the law of the United States into uniformity."[5]

4. Duty to Compel Decision in Accordance with Precedent.

Where this Court has decided a question of federal law, its determination becomes binding, as a pronouncement on the meaning of the federal statute or Constitutional provision interpreted. *Any litigant has power to enforce compliance.*

This principle goes further than any concept of *stare decisis.* It concerns the power and authority of a Supreme Court over tribunals of inferior jurisdiction. We cite the dissenting opinion of Justices Roberts and Frank-

[5]Statement of Senator Cummins made Jan. 31, 1925, in debate on S2060—68th Congress First Session; Vol. 66 Congressional Record at p. 2754.

furter in *Mahnich v. Southern Steamship Co.* (Oct. Term 1943 No. 200):

> ". . . the court below naturally felt bound to follow and apply the law as clearly announced by this Court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. . . . But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing has been said in prior adjudication has force in a current controversy."

5. Breakdown in Circuit Court.

All litigants were granted an appeal as of right in the Circuit Court. The Judiciary Act of 1925 so provides.

> "The Circuit Courts of Appeals *shall have appellate jurisdiction . . . in all cases* save where a direct review of the decision may be had in the Supreme Court. . . ." (Judicial Code Sec. 128, 28 USCA 225.)

That jurisdiction is mandatory. Congress was unwilling to confer a limited jurisdiction on this Court, without an express understanding to that effect.

This Court recognized its legal and moral responsibility. Its Rules of Practice were amended on July 1, 1925, to provide for issuance of a writ,

> *"Where a circuit court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."* (266 US 681.)

Power of Supervision.

This Court has, without doubt, full power to supervise and control the conduct of any lower federal court. Where such Court has wilfully failed to discharge the responsibility imposed by Congress, there can be no question concerning the power to grant relief. A contrary view would lead to absurdity.

This Court is a "Supreme Court". It is vested with the judicial power of the United States. As such it has control over such "inferior courts as the Congress may from time to time ordain and establish".

Every citizen is guaranteed due process in our lower federal courts. This means *procedural due process.* That right is secured by the Fifth Amendment.

Process for Supervision.

The power on certiorari, under Section 240 of the Judicial Code, is equal to any emergency. If a Circuit Court refuses to pronounce judgment, this Court has power to compel action. If such Court becomes involved in hopeless irregularity, this Court can find a way to clear the record. There is no power residing in a Circuit Court which can frustrate the action of this Court.

Our question is, manifestly, one of practice. There is no want of power—no doubt regarding the duty calling for its exercise.

The jurisdiction on certiorari includes authority to grant a writ on condition:

> "It is a common practice for the Supreme Court to grant petitions for certiorari limited to a particular or specified question. . . . Not only does the Court confine review to cases involving questions warranting consideration in the interests of jurisprudence and

> uniformity of decision, but to the particular questions in those cases which are deemed to be of that nature. The power of the Court so to limit the scope of its review in any case cannot be doubted."[6]

Where appropriate, this Court may dispose of a matter by memorandum opinion. It may instruct a Circuit Court to perform any duty which that Court has not discharged. We cite the practice followed in *Anderson v. Atherton,* 86 Fed. 2d 518 (Oct. Term 1936 No. 803).

This Court granted certiorari (300 US 652). Thereafter the Circuit Court was instructed to take further proceedings. We quote from the memorandum opinion at 302 US 643:

> "Per curiam: The Court is of the opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross appeal, the question whether common law liability for negligence would support the decree was not before the Court for review. . . . The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that Court for the determination of that question."

We come here with cases that involve violations of precedent. This Court may deem it unnecessary to review or revise the decisions affected. It may treat the matter as appropriate for summary action.

This Court may act as on a motion to dismiss:

> "Although the Court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argu-

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[6]Jurisdiction of the Supreme Court of the United States—Robertson & Kirkham, pp. 556-557.

ment, order the cause transferred for hearing to the summary docket." (Rule 7, sub. 5.)

There is power to make a limited grant. This may be directed to specific questions—whether the Circuit Court has complied with precedent—whether the entries in that Court are valid—whether that Court has pronounced judgment on the questions propounded. Such a writ can be addressed to any matter within the power of supervision of this Court under Rule 38.

The procedure may be by order to show cause. It can be by any mode of practice which will give respondents a notice and a hearing before issuance of an order.

On reflection, this Court may deem it proper to grant full review. It may decide to receive full argument and render judgment as on direct appeal.

If that course is not followed, the enforcement of precedent becomes a matter of right.

We are unable to conceive of a condition under which this Court could be without power to act under Section 240 of the Judicial Code. We are equally unable to discover any ground that could justify a refusal to exercise such authority.

Dated, San Francisco, California,
October 31, 1944.

Respectfully submitted,
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(Appendix Follows.)